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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH CHARLES CANNAN,

Defendant and Appellant.

G040991

(Super. Ct. No. 06WF0071)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard W. Stanford, Jr., Judge. Affirmed.

Melissa Hill, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr., and Angela M. Borzachillo, Deputy Attorneys General, for Plaintiff and Respondent.

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The Orange County District Attorney charged defendant Joseph Charles Cannan with driving a vehicle while under the influence of alcohol (Veh. Code, § 23152, subd. (a)) and driving a vehicle with a blood alcohol level of .08 percent or more (Veh. Code, § 23152, subd. (b)). To elevate the offenses from misdemeanors to felonies (Veh. Code, § 23550.5, subd. (b)) and to subject defendant to the “Three Strikes” law sentencing scheme (Pen. Code, §§ 667, subds. (d) & (e)(1), 1170.12, subds. (b) & (c)(1)), the information also alleged he had previously been convicted in the State of Arizona of a crime that qualified as a conviction of vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (b); Veh. Code, § 23626).

A jury found defendant guilty of the charged crimes. In a bifurcated trial the court found defendant’s Arizona conviction qualified as vehicular manslaughter while intoxicated and also constituted a prior serious felony conviction under the Three Strikes law and based thereon sentenced defendant to a four-year prison term.

Defendant contends the prosecution failed to properly introduce the documentation relevant to his Arizona prior conviction, the trial court erred in considering the record of his Arizona conviction in deciding whether it constituted a qualifying prior conviction, the evidence fails to support the trial court’s findings as to the nature of that conviction, and the procedure employed by the trial court to make these findings violated his rights under the Sixth Amendment of the United States Constitution as construed in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435]. Because these contentions lack merit, we affirm.

## FACTS AND PROCEDURAL HISTORY

Since defendant does not challenge the validity of his conviction on the underlying charges, a detailed summary of the evidence supporting the verdicts is

unnecessary. Suffice it to say that, one night in July 2005, the police found defendant passed out, sitting behind the wheel of a vehicle stopped in the left-turn lane of a public street with its engine running and lights illuminated. Once awakened, he displayed symptoms of intoxication. A test of a blood sample obtained from him a little over an hour later reflected his blood alcohol level was .15 percent. An expert opined that when arrested, defendant likely had a blood alcohol level of between .16 and .17 percent.

At defendant's request, the trial court bifurcated the prior conviction allegations from the underlying charges. During jury deliberations, the parties discussed what issues needed to be resolved on the prior conviction allegations if defendant was convicted on either of the charged crimes. Defense counsel informed the court "it is not [defendant's] intention to dispute that the prior [conviction] is his," but rather to argue it "is not one that qualifies [to elevate] a misdemeanor to a felony and . . ., if we have to, it's not a strike. . . ." After the court expressed its belief defendant was statutorily entitled "to have a jury decide" only "whether [he] suffered the prior conviction" with "the court . . . decid[ing] whether . . . that the prior is a qualifying prior," defendant agreed to waive a jury trial on all issues relating to the prior conviction allegations.

The jury returned guilty verdicts on both charges. At the subsequent court trial on the Arizona prior conviction, prosecutor presented the following three exhibits:

(1) Exhibit 1 – five documents, including: (a) A felony indictment from the County of Mohave in the State of Arizona charging defendant with two counts, one for manslaughter alleging he "recklessly caused the death" of another on September 2, 1989, and a second count alleging that on the same day he "drove a motor vehicle while under the influence of intoxicating liquor"; (b) a stipulated guilty plea wherein defendant agreed to "plead guilty to: Manslaughter, nondangerous Class 3 Felony" in return for a dismissal of the drunk driving charge and "a sentence . . . cap of 9 years"; (c) two probation department presentence investigation reports, one of which stated defendant

“was driving a vehicle with a blood alcohol content of .14 percent, at which time he was involved in an accident which resulted in a fatality . . . .”; and (d) a four-page sentence of imprisonment dated February 5, 1991, ordering defendant to serve a seven-and-one-half-year prison term. (Some bold and capitalization omitted.)

(2) Exhibit 2 – a 77-page transcript of the February 5, 1991 sentencing hearing wherein defendant’s attorney acknowledged his client had a “.14 blood alcohol level . . . at the time of the accident . . . .”

(3) Exhibit 3 – two documents: (a) The Arizona Department of Corrections’s records relevant to defendant’s incarceration; and (b) the odd-numbered pages of an 11-page memorandum of decision from the Arizona Court of Appeals affirming defendant’s conviction and sentence.

The memorandum of decision’s introductory paragraph stated defendant “was convicted of manslaughter arising from the operation of a motor vehicle while intoxicated” when his “vehicle crossed the center line and collided with a motorcycle, killing the driver.” From the portions of the opinion in the record, it appears defendant’s appeal challenged the trial court’s denial of a motion to withdraw his guilty plea on the basis of newly discovered evidence, and asserted ineffective assistance of counsel. In holding the first argument lacked merit, the opinion noted “the undisputed facts clearly show that defendant was intoxicated and in the wrong lane of travel at impact.” The prosecutor offered to introduce uncertified copies of the even-numbered pages, but the court declined to consider them.

The court reviewed the documents, listened to argument from counsel, and allowed defendant to personally make a statement concerning his Arizona conviction. Defense counsel also interjected hearsay, relevance, and lack of foundation objections to the court’s consideration of some of the documents, including the probation officers’ presentence reports and trial counsel’s sentencing hearing comments. The court found

the prior conviction qualified as a basis for elevating defendant's current convictions to felonies and for authorizing imposition of a Three Strikes law sentence. While the trial judge specifically cited "the probation officer's statement and the defense attorney's statement as to the blood alcohol level" in making his decision, the judge also noted he "can use and should use the entire record" to conclude defendant's Arizona conviction is "a qualifying prior" for both purposes.

## DISCUSSION

### *1. Introduction*

A first-time conviction for driving while under the influence of alcohol or driving with a blood alcohol level of .08 percent or more constitutes a misdemeanor, punishable by imprisonment in the county jail and fine. (Veh. Code, § 23536.)

In 2005, when defendant committed his current crimes Vehicle Code section 23550.5, subdivision (b) declared: "Every person who, having previously been convicted of . . . a felony violation of paragraph (3) of subdivision (c) of Section 192 of the Penal Code, is subsequently convicted of a violation of Section 23152 . . . is guilty of a public offense punishable by imprisonment in the state prison . . . ." In addition, Vehicle Code section 23626 provided "[a] conviction of an offense in any state, territory, or possession of the United States . . . which, if committed in this state, would be a violation of . . . paragraph (3) of subdivision (c) of Section 192 . . . , is a conviction of" that statute "for the purposes of this code." At the time, Penal Code section 192, subdivision (c)(3) declared the crime of manslaughter included killing a human being while "[d]riving a vehicle in violation of Section . . . 23152 . . . of the Vehicle Code and in the commission of an unlawful act, not amounting to felony, but without gross negligence; or driving a vehicle in violation of Section . . . 23152 . . . and in the

commission of a lawful act which might produce death, in an unlawful manner, but without gross negligence.”

Subsequently, the Legislature rewrote Penal Code section 192 and renumbered the form of vehicular manslaughter quoted above as section 191.5, subdivision (b). Vehicle Code sections 23550.5, subdivision (b) and 23626 were also amended to acknowledge this change.

Consequently, a foreign conviction “of an offense . . . that, if committed in this state, would be a violation of . . . Section 191.5 . . . of the Penal Code, is a conviction” of that offense “for the purposes of” the Vehicle Code” (Veh. Code, § 23626) and, if it is “a felony violation,” elevates a subsequent conviction under Vehicle Code section 23152 to a felony (Veh. Code, § 23550.5, subd. (b)).

The Three Strikes law applies to “[a]ny offense defined in . . . subdivision (c) of [Penal Code] Section 1192.7 as a serious felony in this state,” and “a conviction in another jurisdiction for an offense that includes all of the elements of the particular felony as defined in . . . subdivision (c) of Section 1192.7.” (Pen. Code, §§ 667, subd. (d)(1) & (2), 1170.12, subd. (b)(1) & (2).) Penal Code section 1192.7, subdivision (c) defines the term “serious felony” to “mean[] . . . [¶] . . . (8) any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice . . . .”

Finally, Penal Code section 1192.8 provides “[f]or purposes of subdivision (c) of Section 1192.7, ‘serious felony’ also means any violation of Section 191.5 . . . of this code . . . when . . . the[] offense[] involve[s] the personal infliction of great bodily injury on any person other than an accomplice . . . .” (Pen. Code, § 1192.8, subd. (a).) Subdivision (b) of this section declares the Legislature’s intent “to clarify that the crimes specified in subdivision (a) have always been, and continue to be, serious felonies within the meaning of subdivision (c) of Section 1192.7.” (Pen. Code, § 1192.8, subd. (b).)

## 2. *The Least Adjudicated Elements Test*

Defendant pled guilty to violating Arizona Revised Statute section 13-1103. It states, “A person commits manslaughter by: [¶] 1. Recklessly causing the death of another person . . . .” (A.R.S., § 13-1103, subd. A.1.) A violation of Penal Code section 191.5, subdivision (b) involves the “unlawful killing of a human being without malice aforethought, in the driving of a vehicle, where the driving was in violation of Section . . . 23152 . . . of the Vehicle Code, and the killing was either the proximate result of the commission of an unlawful act, not amounting to a felony, but without gross negligence, or the proximate result of the commission of a lawful act that might produce death, in an unlawful manner, but without gross negligence.”

At oral argument here, defendant contended that, in determining whether his Arizona manslaughter conviction would constitute vehicular manslaughter while intoxicated under California law, the trial court could only consider the least adjudicated elements of the Arizona offense, which only required he act recklessly and cause the death of another person. Under this approach, defendant’s Arizona offense is not the statutory equivalent of Penal Code section 191.5, subdivision (b), and thus would not satisfy Vehicle Code sections 23550.5 or 23626.

Generally, it is improper for a party to assert a new issue at oral argument. (*People v. Niles* (1964) 227 Cal.App.2d 749, 758.) But even on the merits, defendant’s contention lacks merit.

In holding a court “may look to the entire record of the conviction” to determine the nature of a prior conviction allegation, *People v. Guerrero* (1988) 44 Cal.3d 343 relied on a series of earlier decisions, each of which applied that approach in determining the applicability of an out-of-state criminal conviction. (*Id.* at pp. 355, 348-355.) Also, in *People v. Crane* (2006) 142 Cal.App.4th 425, the Court of Appeal applied *Guerrero*’s approach in a case where it was alleged the defendant, currently charged with

drunk driving, was alleged to have suffered a conviction of the same crime in Colorado: “If the statutory definition of the crime in the foreign jurisdiction contains all of the necessary elements to meet the California definition, the inquiry ends. If the statutory definition . . . does not contain the necessary elements of the California offense, the court may consider evidence found within the record of the foreign conviction in determining whether the underlying conduct would have constituted a qualifying offense if committed in California, so long as the use of such evidence is not precluded by rules of evidence or other statutory limitation. [Citation.] Where the record presented at trial does not competently disclose the facts of the offense actually committed, the court will presume that the prior conviction was for the least offense punishable under the foreign law. [Citation.]” (*Id.* at p. 433; see also *People v. Miles* (2008) 43 Cal.4th 1074, 1082 [*Guerrero’s* consideration of the entire record of conviction “rule applies equally to California convictions and to those from foreign jurisdictions”].)

Since the prosecution presented evidence from the record of defendant’s Arizona prior conviction, the least adjudicated elements approach does not apply in this case. (*People v. Guerrero, supra*, 44 Cal.3d at pp. 354-355.)

### *3. Failure to Formally Introduce Documentary Evidence*

During trial on the Arizona prior conviction, the court asked the prosecutor if she “ha[d] any documentation that you want to mark and have the court receive to prove the conviction or anything . . . about the conviction.” The prosecutor identified the aforementioned exhibits “[t]he People would like to introduce . . . .” After identification of the exhibits, the court and parties discussed the contents of each of the documents at length. During this discussion, defense counsel interposed evidentiary objections to some of the material. Citing the documentation, the court concluded the record of defendant’s Arizona conviction established it was a qualifying prior conviction. However, the record

reflects the exhibits were never formally introduced into evidence. Defendant argues this misstep is fatal to the prosecution's case.

The argument lacks merit. "The failure to formally and expressly offer the documents into evidence is not necessarily fatal, where the court and both parties treat the documents as if they were in evidence. [Citations.]" (*Komas v. Future Systems, Inc.* (1977) 71 Cal.App.3d 809, 812; see also *Reed v. Reed* (1954) 128 Cal.App.2d 786, 790-791 ["It is well established . . . that when a document has been considered by the court and the parties as being in evidence, the fact that no formal offer in evidence was made will not exclude it from consideration as part of the record on appeal"].)

Defendant claims the foregoing rule is inapplicable in criminal actions. Not so. Penal Code section 1102 declares "[t]he rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this Code." In *Miller v. Superior Court* (2002) 101 Cal.App.4th 728, we applied this statute and the rule that a document treated by the trial court and parties as being in evidence will be considered as such on appeal in the context of a court's ruling on a motion in a criminal prosecution. (*Id.* at pp. 742-743.)

As noted, the trial judge asked the prosecutor about "any documentation that you want to . . . have the court receive," and the prosecutor then identified the exhibits she wanted to introduce. These comments reflect the exhibits were to be introduced unless the court sustained defense counsel's objections to any document. The court and parties reviewed and discussed each of the documents contained in the prosecution's exhibits. The record does not reflect the court sustained any of defense counsel's evidentiary objections. In reaching its decision, the trial court expressly cited certain portions of the exhibits that it believed supported a finding the Arizona conviction constituted a qualifying prior conviction.

The cases cited by defendant do not support a contrary result. In *People v.*

*Encinas* (1998) 62 Cal.App.4th 489, the prosecutor did introduce supporting documentation, but the appellate court found it to be insufficient to support a finding the prior conviction constituted a serious felony. In so ruling, the court rejected the Attorney General's assertion "the trial court, in considering appellant's earlier *motion* to dismiss the allegations, may have learned facts establishing how the subject assault was committed," because "[e]ven if true, that did not relieve the district attorney of his burden to prove *at trial* the truth of the allegations." (*Id.* at p. 492.)

In *People v. Crane, supra*, 142 Cal.App.4th 425, after charging the defendant with violating Vehicle Code section 23152, the prosecution successfully moved to add an allegation he had suffered a prior conviction of that crime in Colorado. The documents attached to the motion reflected the defendant had actually been convicted of driving while ability impaired. Once the jury returned guilty verdicts on the charged crimes, the defendant admitted suffering the Colorado conviction, but denied it qualified as a drunken driving conviction under California law. The trial court used the prior conviction to enhance the defendant's sentence relying on the language of the Colorado statute without receiving any further documentation.

The Court of Appeal reversed. "Because the facts underlying the Colorado offense were not before the trial court, it was required to presume that the Colorado conviction was for the least offense punishable under Colorado law" (*People v. Crane, supra*, 142 Cal.App.4th at p. 433), and since "the Colorado statute punishes conduct which would not violate Section 23152" it "does not meet the test set forth in [section] 23626 . . . ." (*Id.* at p. 432). *Crane* also held that, "[e]ven if the record of the Colorado conviction had been properly presented to the trial court, . . . the result would not change." (*Id.* at p. 434.) Thus, defendant's reliance on dicta in the opinion concerning the need for "competent evidence properly offered and admitted at trial . . . which meets the People's burden to prove the sentence enhancement" (*ibid.*) is unavailing.

We conclude the documents presented by the prosecution in the bifurcated trial on the Arizona prior conviction were properly before the court.

#### *4. Sufficiency of the Evidence*

Defendant next attacks the sufficiency of the evidence concerning his Arizona conviction. Specifically, he argues his “level of alcohol-produced impairment and the accuracy of blood alcohol test results w[ere] disputed, even at the Arizona sentencing hearing,” and certain items of evidence submitted by the prosecution, the probation officer’s presentence report, and defense counsel’s statements at the sentencing hearing, were inadmissible. He further claims since “[t]here was no other admissible evidence presented to . . . establish that . . . , at the time of the manslaughter, [he] was either driving while under the influence[] or . . . with a .08% or more [blood alcohol level],” “[t]he Arizona judgment establishes nothing more than that [he] was reckless and caused someone’s death.”

We disagree. “The People must prove all elements of an alleged sentence enhancement beyond a reasonable doubt. [Citation.]” (*People v. Miles, supra*, 43 Cal.4th at p. 1082.) “[H]owever, ‘[b]ecause the nature of the *conviction* is at issue, the prosecution is not allowed to go outside the record of conviction to “relitigat[e] the circumstances of a crime committed years ago. . . .” [Citations.] Instead, the relevant inquiry in deciding whether a particular prior conviction qualifies . . . for California sentencing purposes is limited to an examination of the record of the prior criminal proceeding to determine the nature or basis of the crime of which the defendant was convicted. [Citations.]” (*People v. McGee* (2006) 38 Cal.4th 682, 691.) In addition, a consideration of the record of a conviction is limited by “the rules of evidence or other statutory limitation” (*People v. Myers* (1993) 5 Cal.4th 1193, 1201), including “[t]he normal rules of hearsay” (*People v. Woodell* (1998) 17 Cal.4th 448, 458).

In applying these rules, “the trier of fact may draw *reasonable inferences* from the record presented,” and “[a]bsent rebuttal evidence, . . . may presume that an official government document, prepared contemporaneously as part of the judgment record, and describing the prior conviction, is truthful and accurate.” (*People v. Miles, supra*, 43 Cal.4th at p. 1083.) “On review, we examine the record in the light most favorable to the judgment to ascertain whether it is supported by substantial evidence. In other words, we determine whether a rational trier of fact could have found that the prosecution sustained its burden of proving the elements of the sentence enhancement beyond a reasonable doubt. [Citations.]” (*Ibid.*)

The Supreme Court has “never defined exactly what comprises the record of conviction to which the trier of fact may look to determine whether a prior conviction qualifies as a serious felony. [Citation.]” (*People v. Woodell, supra*, 17 Cal.4th at p. 454.) However, as defendant notes, *People v. Trujillo* (2006) 40 Cal.4th 165 rejected the Attorney General’s attempt to rely on a defendant’s postplea admission to a probation officer that he had stabbed the victim with a knife to support a finding that his prior conviction for inflicting corporal injury was a serious felony under Penal Code section 1192.7, subdivision (c)(23) [“any felony in which the defendant personally used a dangerous or deadly weapon”]. In so ruling, the court held “a defendant’s statements, made after a defendant’s plea of guilty has been accepted, that appear in a probation officer’s report prepared after the guilty plea has been accepted are not part of the record of the prior conviction, because such statements do not ‘reflect[] the facts of the offense for which the defendant was convicted.’ [Citation.]” (*People v. Trujillo, supra*, 40 Cal.4th at p. 179.)

Noting “[t]he prosecution could not have compelled defendant to testify, and thus could not have used defendant’s subsequent admission that he stabbed the victim to convict him,” and “[o]nce the court accepted his plea, defendant could admit to

the probation officer having stabbed the victim without fear of prosecution, because he was clothed with the protection of the double jeopardy clause from successive prosecution for the same offense” (*People v. Trujillo, supra*, 40 Cal.4th at p. 179), *Trujillo* concluded “[b]arring the use of a defendant’s statement reflected in a probation officer’s report . . . is consistent with [the] rule . . . that in determining the nature of a prior conviction, the court may look to the entire record of the conviction, ‘but no further.’ [Citation.] The reason for this limitation [is] to ‘effectively bar[ ] the prosecution from relitigating the circumstances of a crime committed years ago and thereby threatening the defendant with harm akin to double jeopardy and denial of speedy trial.’ [Citation.] Permitting a defendant’s statement made in a postconviction probation officer’s report to be used against him to establish the nature of the conviction would present similar problems, creating harm akin to double jeopardy and forcing the defendant to relitigate the circumstances of the crime.” (*Id.* at p. 180.)

As for the reference to defendant’s blood alcohol level appearing in the probation officer’s presentence report, the holding in *Trujillo* is directly on point. Since his defense attorney in that action was speaking on his behalf when he acknowledged the blood alcohol level during the sentencing hearing, a similar result would appear to apply to counsel’s statement. Furthermore, it is clear neither defendant nor his attorney had personal knowledge as to defendant’s blood alcohol level when the Arizona accident occurred, and both statements would also be inadmissible on hearsay grounds.

The Attorney General does not argue otherwise, but rather contends the trial court’s finding can be affirmed based on the statements concerning the nature of defendant’s prior conviction appearing in the Arizona Court of Appeal’s memorandum of decision. We agree with this approach.

In *People v. Woodell, supra*, 17 Cal.4th 448, the Supreme Court held “appellate opinions, in general, are part of the record of conviction that the trier of fact

may consider in determining whether a conviction qualifies under the sentencing scheme at issue.” (*Id.* at p. 457.) There, a defendant found guilty of burglary, was alleged to have suffered a conviction in North Carolina for assault with a deadly weapon inflicting serious injury. To establish this prior conviction constituted a serious felony under Penal Code section 1192.7, subdivision (c)(23), the prosecution introduced an opinion from the North Carolina Court of Appeals, which showed the defendant’s conviction was based on his personal, as distinguished from vicarious, use of a weapon.

The Supreme Court upheld use of the appellate court opinion. “We see no reason to limit the record of conviction to the trial court record and to preclude reference to the appellate court record, including the appellate opinion. . . . As we [have] explained . . . , we allow recourse to the record of conviction, but no further, to promote the efficient administration of justice and to preclude the relitigation of the circumstances of the crime. [Citation.] Including the appellate opinion as part of the record of conviction promotes efficiency and does not relitigate stale factual questions. [¶] Allowing consideration of the appellate opinion [also] makes practical sense. An opinion that either affirms, reverses, or modifies a conviction is one of the most logical sources to consider in determining the truth of the prior conviction allegation. . . . The appellate opinion reflects what is in the trial record. Often, it will be more practical to obtain the opinion than the trial record . . . .” (*People v. Woodell, supra*, 17 Cal.4th at p. 456.)

The Arizona Court of Appeals’s memorandum of decision establishes defendant’s Arizona manslaughter conviction satisfies the elements of the California offense of vehicular manslaughter while intoxicated. (Pen. Code, § 191.5, subd. (b).) To convict someone of the latter crime, the prosecution must prove a person “(1) dr[ove] a vehicle while intoxicated; (2) when so driving, committing some unlawful act, such as a Vehicle Code offense . . . , or commit[ted] . . . an ordinarily lawful act which might produce death; and (3) as a proximate result of the unlawful act or the negligent

act, another person was killed. [Citation.]” (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1159 [stating elements of a violation of gross vehicular manslaughter while intoxicated under Pen. Code, § 191.5, subd. (a)].) The first two sentences of the memorandum of decision’s introductory paragraph reflect defendant’s conviction “a[rose] from the operation of a motor vehicle while intoxicated” where he “crossed the center line and collided with a motorcycle, killing the driver.”

As for the Arizona conviction’s status as a serious felony, a vehicular manslaughter conviction under Penal Code section 191.5 has been held eligible to be “a serious felony if in the commission of the crime the defendant personally inflicts great bodily injury on any person other than an accomplice . . . .” (*People v. Gonzales* (1994) 29 Cal.App.4th 1684, 1688 [applying rule to gross vehicular manslaughter conviction under Pen. Code, § 191.5, subd. (a)].) In this case, defendant does not contend the motorcyclist did not suffer great bodily injury as a result of the accident.

In *Woodell*, the Supreme Court noted “the appellate opinion itself, representing the action of a court, clearly comes within the exception to the hearsay rule for official records. [Citations.]” (*People v. Woodell, supra*, 17 Cal.4th at p. 458.) “[O]fficial government records clearly describing a prior conviction presumptively establish that the conviction in fact occurred, assuming those records meet the threshold standards of admissibility. (See Evid. Code, § 664 [“It is presumed that official duty has been regularly performed”].) Some evidence must rebut this presumption before the authenticity, accuracy, or sufficiency of the prior conviction records can be called into question.” [Citation.]” (*People v. Delgado* (2008) 43 Cal.4th 1059, 1066.)

But *Woodell* also acknowledged the “normal rules of hearsay generally apply to evidence admitted as part of the record of conviction to show the conduct underlying the conviction,” and “[t]he fact that a court may judicially notice an opinion under Evidence Code section 452 or admit it into evidence under the official record

exception to the hearsay rule (Evid. Code, § 1280) . . . does not mean that all hearsay statements within the opinion are also admissible or noticeable.” (*People v. Woodell, supra*, 17 Cal.4th at p. 458.) Citing this limitation, defendant argues the memorandum of decision amounts to inadmissible hearsay. We disagree.

*Woodell* held that “because the ultimate question is, of what crime was the defendant *convicted*, another way to decide this question is to look to a court ruling, including an appellate opinion, for the nonhearsay purpose of determining the basis of the conviction.” (*People v. Woodell, supra*, 17 Cal.4th at p. 459.) “When a trial court considers whether to admit an appellate opinion for this purpose, it should focus on the issue . . . resolve[d] . . . . It should carefully consider whether the opinion as a whole, including any factual statements, is probative on whether the conviction was based on a qualifying theory. It should not simply admit any opinion containing relevant factual statements but only those probative on this specific issue. . . . [I]f the opinion refers to facts in a fashion indicating the evidence was disputed and the factual issue unresolved, that reference would have little, if any, tendency to show the basis of the conviction,” but “[i]f the opinion refers to facts as established, that reference would be probative on the basis for the conviction.” (*Id.* at p. 460.)

These comments are applicable here. While the evidence at the hearing on defendant’s motion to withdraw his Arizona guilty plea reflected a dispute existed over the details of how the collision occurred, there was no dispute defendant drove a vehicle while intoxicated and struck the victim while on the wrong side of the road.

Defendant alternatively argues the trial court did not rely on the Arizona Court of Appeals’s memorandum of decision. The record belies this assertion. The trial judge expressly stated he “can use and should use the entire record” to conclude defendant’s Arizona conviction is “a qualifying prior” for both purposes. Furthermore, “[o]n review, we examine the record in the light most favorable to the judgment to

ascertain . . . whether a rational trier of fact could have found that the prosecution sustained its burden of proving the elements of the sentence enhancement beyond a reasonable doubt. [Citations.]” (*People v. Miles, supra*, 43 Cal.4th at p. 1083.)

But even if defendant’s argument is correct, it would amount to only state law error subject to the *People v. Watson* (1956) 46 Cal.2d 818 standard of whether a reasonable probability exists that a different result would have been reached in the absence of the error. (*Id.* at p. 836; *People v. Epps* (2001) 25 Cal.4th 19, 29.) That is not the case here. Thus, the trial court properly found defendant’s Arizona manslaughter conviction qualified as a basis for both elevating his current convictions to felonies and to impose sentence under the Three Strikes law.

#### 5. *Apprendi Error*

Finally, defendant claims the court trial on the nature of his Arizona prior conviction violated his Sixth Amendment rights as construed in *Apprendi v. New Jersey, supra*, 530 U.S. 466. The applicable law is to the contrary.

First, we note the court offered to have the jury decide “whether [he] suffered the prior [Arizona] conviction,” but defendant waived that right because the trial judge concluded the issue of “whether . . . that the prior is a qualifying prior” was not a jury question. Contrary to defendant’s contention, this complies with California law.

Under Penal Code section 1025, “[e]xcept [for the issue of whether the defendant is the person who suffered the prior conviction], the question of whether or not the defendant has suffered the prior conviction shall be tried by the jury that tries the issue upon the plea of not guilty, . . . or by the court if a jury is waived.” (Pen. Code, § 1025, subd. (b); see also Pen. Code, § 1158 [“Whenever the fact of a previous conviction of another offense is charged in an accusatory pleading, and the defendant is found guilty of the offense with which he is charged, the jury, or the judge if a jury trial is

waived, must . . . find whether or not he has suffered such previous conviction”].) “Thus, sections 1025 and 1158 grant to a defendant the right to have the jury determine only the factual question whether he suffered the alleged prior conviction . . . . [¶] Legal questions, such as whether . . . a prior . . . felony conviction qualifies as a ‘serious felony’ under the Three Strikes law, are matters to be determined by the court. [Citations.]” (*People v. Williams* (2002) 99 Cal.App.4th 696, 700-701.)

Second, defendant’s claim this approach violates federal law is unavailing. Noting “[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed” (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 490), *Apprendi* held “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (*Ibid.*) The “fact of a prior conviction” exception recognized in *Apprendi* resulted from its prior decision in *Almendarez-Torres v. United States* (1998) 523 U.S. 224 [118 S.Ct. 1219, 140 L.Ed.2d 350].

Relying on the “fact of a prior conviction” exception, the California Supreme Court has rejected the claim “the federal Constitution [mandates] . . . a jury, rather than *the court*, examine the record of the prior criminal proceeding to determine whether the earlier conviction subjects the defendant to an increased sentence [even] when that conviction does not itself establish on its face whether or not the conviction constitutes a qualifying prior conviction for purposes of the applicable sentencing statute.” (*People v. McGee*, *supra*, 38 Cal.4th at p. 686.) Citing *McGee*, the Supreme Court recently noted its prior decisions “have rejected a narrow or literal application of the high court’s reference to ‘the fact of a prior conviction[.]’” and again “held that a trial court may, consistent with *Apprendi*, determine “‘the nature or basis’ of a defendant’s *prior conviction*” including “‘whether *that conviction* qualified as a conviction of a serious felony.’” (*People v. Towne* (2008) 44 Cal.4th 63, 79.)

Decisions of the California Supreme Court are binding on us. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Therefore, we conclude the trial court properly decided the issues of whether defendant's Arizona prior conviction qualified as a basis for elevating his current crimes to felonies and that it constituted a serious felony under the Three Strikes law.

#### DISPOSITION

The judgment is affirmed.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

FYBEL, J.